INTERGOVERNMENTAL ADVISORY COMMITTEE
to the FEDERAL COMMUNICATIONS COMMISSION

ADVISORY RECOMMENDATION No: 2018-01

In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79

I. Introduction

State, Tribal, and local governments support the deployment of next-generation wireless infrastructure. Paving the way for 5G and related technologies[1] in all parts of the United States is a national priority which we all support. The potential for ultra-fast, low-latency, and high-capacity wireless connections suggests that 5G can power advancements in healthcare, business, entertainment, public safety, and many other areas. State, local, and Tribal governments are committed to working as partners with industry and all stakeholders to accelerate 5G deployment into our communities. Indeed, State, Tribal, and local governments have a long track record of collaborating successfully with the industry to meet our common connectivity goals.

Despite the weight of evidence to the contrary, there are some who assert that state, Tribal, and local governments create widespread harmful and unnecessary barriers to the deployment of wireless infrastructure. Those holding this misguided view would have the federal government preempt and limit local control over wireless infrastructure siting decisions and impose federal one-size-fits-all rules emanating from Washington, D.C. For reasons outlined in this Advisory Recommendation, the Intergovernmental Advisory Committee (IAC) strongly recommends against preemption or other limits of local control over wireless infrastructure siting decisions. Past practice, as well as the evidence in this record suggests that preemption is unnecessary, will produce unintended consequences, and fundamentally runs afoul of the careful balance struck by Congress between federal and local authority. Instead of preemption, the IAC recommends a more nuanced approach that can include technical assistance (perhaps in the form of model codes) and collaborative educational efforts from the FCC while ultimately allowing space for locally-tailored solutions to deployment challenges.

The current process for siting wireless infrastructure is not fundamentally broken. By and large, local, state, and Tribal governments' balanced approach has not prohibited or had the effect of prohibiting carriers' ability to provide service. Nevertheless, the IAC recognizes that many communities' regulatory regimes were built for an era dominated by large macro-cell towers. Technology has changed and so should state, local, and Tribal governments' approach to it. Indeed, many state, local, and Tribal governments are already undertaking this effort, and we can learn a great deal from their successes and challenges.

[1] There are multiple definitions of 5G, and for purposes of this Advisory Recommendation, we consider that 5G will densify wireless networks, increase capacity, decrease latency and transmit data at speeds significantly faster than today's technology allows.

While there may be a limited number of governmental entities that have acted in a manner to delay deployment, it is also true that there have been industry bad actors as well. The record in this docket suggests that it is not appropriate to simply blame one side or the other. It might be easy to find a handful of parties on either side to assign responsibility, but the Commission cannot make national policy decision based upon these limited examples. Rather, we should collectively explore the reasons why these deployment activities are successful, and then seek to build upon those experiences. When one considers the examples of governmental entities that have effective relationships with those siting wireless facilities, it is most often the case that the provider or infrastructure owner itself is directly involved in the application process and has not delegated the responsibility to a contractor. Successful relationships exist where applicants work effectively with local government staff and do not pit staff against elected or appointed officials. We also find success where regulatory bodies proactively work to amend local codes governing facilities siting, and when applicants are well educated about the local regulatory requirements and follow processes that promote the filing of complete applications at the outset of the process.

State, Local, and Tribal governments enthusiastically support the deployment of next-generation wireless infrastructure, but the greatest success will come from a regulatory framework that allows some flexibility at the local level. On the other hand, an approach that simply seeks to identify local government authority and remove that authority will create tremendous conflict and undermine the broader purpose of creating a collaborative deployment approach for the future.

This Advisory Recommendation will address these issues: First, we will discuss in some detail the principles that guide the state, local, and Tribal perspective on wireless infrastructure. Second, we will present the clear risks that would follow from a decision to preempt state, local, and Tribal control over wireless infrastructure siting. Third and fourth, we will share insights from successful ordinances across the country; in contrast, we will also share examples of how some industry members themselves generated barriers to deployment and how local governments responded. Finally, we will present the FCC with recommendations on how to proceed with the various wireless proceedings.

II. Issues the Commission Should be Focusing on as it Considers Deployment

While there is near unanimous support for 5G and related technologies in our communities, the way network facilities are deployed matters to state, local, and Tribal governments, and it should matter to the Commission. The IAC suggests that the following six topics ought to be front and center of any Commission discussions.

1. The Commission Must Complete its Pending RF Proceeding.

Like State, Local and Tribal governments, the public also wants better wireless broadband, but they have significant concerns about the how the new infrastructure will affect their neighborhoods, property values, and health. Indeed, the number one complaint from residents centers on concerns about the potential health effects of the increased RF emissions by the intensity, proximity, and number of new antennas anticipated. The Commission last updated its RF emission standards over 20 years ago, and despite promises to update those standards, Commission inaction is undermining the public's confidence that Commission's rules adequately address current and future wireless technologies. While the

Commission did open a proceeding in 2013 on this subject[2] it has not yet concluded it. Congress gave the Commission exclusive jurisdiction to set RF emission standards, and it is incumbent on this Commission to update those standards before or at least concurrently with taking other actions to promote deployment activities. While the public wants better wireless broadband, the public looks to its local land use officials to address their concern. The lack of updated Commission rules based upon the most recent scientific evidence is a significant barrier to public support for deployment. The Commission must give State, Local and Tribal governments the information it needs to explain the Commission's actions to protect the public health relative to RF emissions from increased wireless facilities.

2. The Commission Must Consider How to Address Use of Vertical Infrastructure in Public Rights of Way Owned by Public Utilities.

While the IAC supports collaborative efforts to promote deployment of 5G networks, we believe there are actions the Commission can take to assist local, state and Tribal government and the industry with this effort. This Docket has, in our opinion, been overly focused on government regulations regarding use of public rights of way. The NPRM is strangely silent regarding the issue of access to most of the vertical infrastructure already located in the rights of way. The vast majority of poles in the rights of way are not owned by governmental entities. They are street lights and electric distribution poles owned by investor-owned utilities, telephone companies, rural cooperatives and other public utilities. In many cases, these utilities are willing to discuss the use of their infrastructure for the siting of wireless broadband facilities. But in far too many cases, these entities refuse (or make it very difficult) to allow attachments of wireless infrastructure to their existing vertical assets in local rights of way. This is perhaps the greatest barrier to deployment throughout the country.

The Commission must recognize, when it and the wireless industry continually remind us of the need for hundreds of thousands of new sites (many of which will be in the rights of way), that it falls on Local, State and Tribal government to determine appropriate locations for these sites, and also to ensure that as many existing structures can be utilized, in order to minimize the demand for new, stand-alone sites. When hundreds of thousands of potential sites remain out of consideration for siting wireless facilities, the Commission should take note, and focus on how it can help make these existing sites available. Both industry and government will benefit from that focus.

3. Any Commission Action Must Preserve Public Engagement in Siting Decisions and Should Give New State Laws an Opportunity to Work.

The IAC urges the Commission not to take any action that would jeopardize the ability for local decisionmakers to have the time necessary for a transparent, deliberate, and fair public engagement process when acting on siting applications. While many local governments do not view shot clocks as necessary or helpful in expediting siting, the shot clocks adopted in 2009 have largely been accommodated well, and there is no evidence of systemic problems.

The Commission has questioned the need for pre-application meetings in connection with the siting process, and have suggested that when pre-application meetings are required, the shot clock should commence as of the date of the meeting.[3] Pre-application meetings between an applicant and local governments have been common for many years and are most certainly not limited to siting of wireless

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[2] In the Matter of Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields, ET Docket No. 13-84, released March 29, 2013.
[3] NPRM and NOI at para. 20.

facilities. Whether it be a housing development, shopping center, cell tower application or application to increase the height of a pole in the right-of-way, a pre-application meeting gives the applicant a chance to better understand the application and approval process, get questions answered from staff, and ultimately be better prepared for a smooth and time efficient process when the application is ultimately filed. It has been our experience that many times, an applicant (including applicants for wireless facilities siting) attend these meetings and then wait months prior to submitting an application. The point is that (1) these meetings have great benefit for both the applicant and the government entity, to effectuate a more efficient process and eliminate potential deficiencies in the initial filing and (2) by definition, they take place before an application is filed, so it would be impossible to start a shot clock requiring the government to take action on an application that has not yet been filed and may not be filed until long after the shot clock period expires.

In addition, a number of states have passed (and others are considering) new laws addressing small cell deployment, including new shot clocks for small cell applications. Local governments have been amending their regulatory processes to address the new state laws, and additional, potentially conflicting rules from the Commission will only increase costs, and delay siting considerations as new local rules must be adopted to supersede the relatively new rules already adopted. At a minimum, Commission action that requires governmental entities to rewrite relatively new regulatory processes adopted to comply with new state laws will cause confusion impacting the effectiveness of siting practices.

4. The Commission Must Respect State, Local and Tribal Legal Authority that Permits Governmental Entities to Recover Fair Compensation for the Use of Public Property.

The primary use of public rights of way is for the safe and efficient movement of vehicular, bicycle, and pedestrian traffic. All other uses are secondary. Further, the government owns and incurs the cost to maintain the rights of way in order to ensure that primary use. To the extent permitted by state law, third parties must comply with all police power regulations and in appropriate circumstances when determined by the owner of the property, pay fair consideration for its use.

Congress recognized the right to recover fair compensation by private use of the public rights-of-way in the Telecommunications Act of 1996. See, 47 U.S.C. Sec. 253. The right to charge rent for the access to the rights-of-way and use of public structures in the rights-of-way must be non-discriminatory and competitively neutral. When required, it may be based on reasonable, market-based rent, which is not unlike federal policy which requires compensation for spectrum licenses of private entities that use the public's airwaves. Any limitations of local government authority to limit rights-of-way charges to cost recovery only are state legislative decisions. The Commission has no authority in this arena.

5. The Commission needs to focus on incentives for broadband deployment to rural and low-income areas.

It cannot be disputed that when 5G is deployed, it will be focused in urban and more densely populated suburban areas. The Commission should be focused on incentives and/or requirements imposed upon licensees to build out 5G infrastructure on Tribal lands and in rural areas throughout the country. Setting aside for the moment whether the Commission has legal jurisdiction to shorten shot clocks, limit compensation, and dictate the terms under which local land use approvals must be considered, from a pure policy standpoint, the Commission knows from past history that the industry is going to deploy facilities where it will receive the greatest return on investment. That is absolutely appropriate in a capitalist economy. Wireline facilities were deployed in higher density areas in similar fashion through the country, despite the fact that some cities had highly regulatory and more costly

processes compared to others. Wireless facilities can be expected to be deployed in a similar manner, and indeed to date, we see more robust wireless infrastructure in these higher density communities, regardless of the regulatory framework.

The Commission should be focuses on equitable deployment not only in rich, dense areas, but also in rural and poor areas. Instead of focusing on one-size-fits-all rules limiting local and state authority, which may slightly decrease the cost of doing business and increase profits but will do nothing to incent deployment in rural and poor communities, the Commission should be focusing on incentives to deploy in these harder to serve areas. If the Commission adopts rules regarding siting limitation upon local governments, the industry should only be able to take advantage of those rules if it makes a binding, enforceable commitment to increase its capital investment in facilities in rural and poor areas by some minimum investment over its previous year's spending. Alternatively, companies should have their licenses conditioned upon building networks in rural areas of comparable capacity to the networks in urban and suburban areas.

6. The Commission should ensure equitable treatment between federal, State, Tribal, and local governments.

Further, if the Commission were to adopt shorter shot clocks than currently exist, it would put more onerous requirements on state/local/Tribal governments than what Congress is proposing for the federal government. The MOBILE NOW Act (S. 19), which the Senate passed, requires that federal agencies grant or deny wireless infrastructure applications on federal property within 270 days. Interestingly, the MOBILE NOW Act does not impose a "deem granted" remedy for applications on federal property that exceed the 270 day shot clock. There is nothing inherently more difficult to process applications to site facilities on federal property than siting on State, local or Tribal property.

7. The Commission should consider the unintended consequences of adopting rules that further preempt State, local, and Tribal control related to siting of wireless infrastructure.

The Commission, the IAC and the jurisdictions that the IAC represents share the goal of greater deployment, to be accomplished efficiently and effectively. Federal preemption of State, local and/or Tribal authority, while purportedly intended to speed to deployment, will likely have the opposite effect. Please consider the following examples.

A new, shorter shot clock, especially one that allows for "batch" applications for multiple sites, can put a significant strain on the capability of staff to address these applications. The wireless industry claims that hundreds of thousands of new sites will be necessary to roll out 5G technology, which means that hundreds of thousands of applications will need to be reviewed. Community development public works staff must give careful consideration to all applications. Local residents must be assured that the wireless industry is not operating under a special set of rules whereby all other developments involving construction in a community are addressed in one manner, taking the time necessary to address relevant public health and safety issues, while wireless applications must be acted upon within a time period that does not permit careful consideration of compliance with local codes. Indeed, dedicated local government and Tribal government employees will not give short shrift to application review and consideration of code compliance. If they are not given sufficient time to review applications, and are faced with "deemed granted" remedies for failure to make a decision, we fear the Commission will have created an incentive to deny applications on the grounds that local and Tribal community staffs have not been able to verify code compliance in the short time frame in which they've been forced to act. This effect combined with enormous strain placed on the limited resources relative to the volume of

applications will further delay the deployment of wireless infrastructure as the proceedings end up in the Courts.

The examples of collaboration and good siting experiences described below have occurred in large part due to good faith efforts of localities and the industry to work together. The pending notices of proposed rulemaking put industry and government in an adversarial position, especially when the vast majority of "evidence" the industry has cited in the record consists of unnamed jurisdictions that have no way to respond. Local governments have also, for the most part, worked very well with industry to implement the Commission's Section 6409 collocation rules. If the collaborative, creative manner that most local governments have engaged in with industry is "rewarded" with rules that further preempt local control and local land use authority, and create a special set of rules that only one category of applicant benefits from in every local jurisdiction, localities will have no incentive to continue collaborative efforts with the parties that stand to benefit from that collaboration.

Another example of unintended consequences relates to the use of other government property outside of the rights-of-way for the siting of wireless facilities. There are many wireless sites that already exist on public property, usually subject to lease or license agreements between the tenant and the local government landlords upon terms similar to private sector land leases. If the Commission acts to limit compensation for these kinds of site agreements (and here again, the IAC believes there is no legal authority to do so), then local governments will simply stop making its property available for these uses. The effect of that kind of rule would be to take thousands of potential wireless sites off the market.

In essence, rules that preempt local authority create more adversarial relationships between the industry and government property owners, and in the long run, will create more barriers and cause more problems in connection with wireless facilities siting.

III. Examples of Successful Ordinances and Agreements

Without any directives from the federal government, many local governments across the country have been actively working to bring local codes up to speed, develop model agreements, and take other action, in collaboration with industry, to prepare for the increased deployment necessary to accommodate 5G technology. We fear that Commission rules dictating specific processes that must be followed, and specific time frames in which work must be accomplished, will put a serious damper on these collaborative efforts. It should be noted that these efforts have resulted in different forms of ordinances and agreements in different parts of the country, to address the differences inherent in our many communities. The Commission should avoid any action that could limit this creativity. What follows here are examples of local government collaboration with the wireless industry on siting issues.

1. Colorado. The Colorado Communications and Utility Alliance (CCUA) is a non-profit corporation, consisting of towns, cities, counties and school districts of all sizes throughout the state. CCUA currently has approximately 60 members. In 2017 and together with the wireless industry, CCUA developed model license agreements for deployment of small cell technology, consistent with Colorado's new state law on small cell siting. An agreement with Mobilitie has led to variations of that model that are being used with Crown Castle, AT&T and Zayo. A model agreement with Verizon is, at the time of this writing, making progress. These model agreements will save considerable time and expense for both localities and the industry in siting small cell facilities in public rights-of-way.

2. Montgomery County, Maryland. Montgomery County has reviewed over 2,900 applications and currently has 1,121 wireless facilities in 534 unique locations. The County has complied with all federal shot clocks and never has been sued for failing to meet federal rules. The process for siting

wireless infrastructure is predictable, transparent, fair, and fast. Wireless providers submit applications to a central committee that reviews them for compliance with federal, state, and local rules. In most instances, complete applications are approved by the committee and then are granted a permit. Committee staff are available to meet with providers prior to submitting their applications to work out any issues beforehand. The County is also currently working with all stakeholders on changes to the code that would further streamline and speed up the application process.

3. Cincinnati, Ohio. The City of Cincinnati has developed design guidelines, created in collaboration with industry, and several industry representatives praised the guidelines at the hearing to introduce the ordinance. Crown Castle cited the process and the design guidelines in its filings in this Docket as an example of collaboration done correctly.[4] The Cincinnati guidelines lay out clear, objective standards to determine the applicable process, and that process is largely administrative except in special circumstances. The guidelines contain a "pre-approved configuration" based on the existing poles found throughout the city and a chart that specifies the level of review for all zones. If an applicant comes in with the pre-approved configuration, it can be approved over the counter in most circumstances. If there are special considerations, such as a deviation from the pre-approved configuration, then the staff has to make certain administrative findings before an approval, which is still administrative and completed in a timely manner. Applications only require zoning hearings when staff cannot make the administrative findings that the design guidelines are met, or when the project would impact historic resources.

4. Georgia. The Georgia Municipal Association (GMA) has developed a model right of way licensing agreement with Mobilitie, to effectuate siting of small cell facilities in public rights-of-way. The GMA model agreement is being used by cities as a template or guideline when negotiating terms with Mobilitie. See, https://www.gmanet.com/Advice-Knowledge/Sample-Documents/Model-Master-Right-of-Way-License-Agreement.aspx.

5. Denver, Colorado. Denver has developed, in collaboration with industry, a process for reviewing and administratively approving applications, which is now publicly available on the Denver website. It has been praised publicly by multiple industry providers. https://www.denvergov.org/content/dam/denvergov/Portals/730/documents/ROWServices/small-cell-infrastructure-2017.pdf

6. Eugene, Oregon. In the late 1990s, the City of Eugene developed new code provisions to address siting of wireless communications facilities, which have been used over the years as technology has changed, to facilitate effective and efficient deployment of industry facilities. During the major infrastructure upgrade from 3G to 4G the City's regulatory process created the right format for collaboration and progress in deployment. In its Comments in WT Docket 16-41, In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling, Eugene included a December 2012 letter from AT&T to the City praising the City's regulatory structure and staff assistance in facilitating the very complex issues of siting in connection with the 3G to 4G upgrade. The fact that the industry notes these are complex issues lends further support to our earlier comments about the need to afford local government the time it needs to properly address them through the application process. There is no reason to think that this collaborative success in Eugene will not be continued during the transition to 5G.

[4] Crown Castle Comments, WT Docket No. 17-79, pp. iii, 8, filed June 15, 2017.

IV. Barriers Erected by the Industry and What the Commission Can Do to Help

If the Commission is truly interested in examining the environment of siting wireless facilities, it must not ignore industry practices. In our experience and based upon information we have received from our colleagues around the country, one of the most significant barriers to smooth and efficient deployment is the problem of incomplete applications. It is unfortunately far more common than not that applications for siting approval have to be sent back to the applicant to be corrected, before they can be processed. This problem usually occurs when the provider or infrastructure owner has hired a subcontractor to file and manage the application. Our experience suggests that the process almost always works better when the actual provider or owner of the infrastructure is working directly with the permitting authorities. We are not suggesting that the Commission adopt any rules to address this issue. However, the Commission can certainly explore this problem in more detail, perhaps through a Notice of Inquiry, and can encourage industry applicants to do a better job ensuring that the initially filed applications are complete, and consistent with all local requirements.

As noted above in Section II.2, making poles, no matter who owns them, more accessible to all wireless providers will go a long way in promoting deployment of wireless infrastructure. To the extent that a street light pole, an electric distribution pole or a telephone pole can structurally hold wireless equipment, and the attachment of wireless facilities is consistent with local zoning and public safety codes, and no other special circumstances exist (such as special decorative poles in historic areas, etc.), these poles must be made available for deployment of 5G facilities. This has been an intra-industry discussion, where local government often must wait to see if the industry entity that owns the pole will make it available as a wireless site.

V. Recommendations to the Federal Communications Commission

In summary, the IAC makes the following recommendations to the Commission:

1. The Commission Must Complete its Pending RF Proceeding.

The number one barrier to public support of wireless infrastructure deployment in communities is the lingering concern over the health effects RF emissions. The Commission must address this legitimate public concern in a direct and substantive way before or at least concurrently they take additional actions to promote deployment.

2. The Commission Must Consider How to Address Use of Vertical Infrastructure in Public Rights of Way Owned by Public Utilities.

The vast majority of poles in the rights of way are not owned by governmental entities, but rather by investor-owned utilities, telephone companies, rural cooperatives and other public utilities. In far too many cases, these entities refuse (or make it very difficult) to allow attachments of wireless infrastructure to their existing vertical assets in local rights of way. The Commission should explore ways to promote greater access to these assets.

3. Any Commission Action Must Preserve Public Engagement in Siting Decisions and Should Give New State Laws an Opportunity to Work.

The Commission and State, local, and Tribal governments have a common interest in promoting a process for wireless infrastructure siting that is fair, transparent, and deliberate. The shot clocks adopted in 2009 have largely been accommodated well and have not diminished public engagement in the siting process. The Commission should act cautiously to preserve the important role of the public in the process.

4. The Commission Must Respect State, Local and Tribal Legal Authority that Permits Governmental Entities to Recover Fair Compensation for the Use of Public Property.

Congress recognized the right to recover fair compensation by private use of the public rights-of-way in the Telecommunications Act of 1996. Any limitations of local government authority to limit rights-of-way charges to cost recovery only are state legislative decisions.

5. The Commission needs to focus on incentives for broadband deployment to rural and low income areas.

The Commission knows from past history that the industry is going to deploy facilities where it will receive the greatest return on investment, which are urban and densely-populated suburban areas. That is the nature of a market-based economy. Thus, the Commission should instead focus their efforts on incentivizing wireless deployment in rural and low-income areas.

6. The Commission should ensure equitable treatment between federal, State, Tribal, and local governments.

If the Commission were to adopt shorter shot clocks than currently exist, it would put more onerous requirements on State, local, and Tribal than what Congress is proposing for the federal government in the MOBILE Now Act (S.19). There is nothing inherently more difficult to process applications to site facilities on federal property than siting on State, local or Tribal property.

7. The Commission should consider the unintended consequences of adopting rules that further preempt State, local, and Tribal control related to siting of wireless infrastructure.

Federal preemption of State, local and/or Tribal authority, while purportedly intended to speed to deployment, will likely have the opposite effect. Rules that preempt local authority create more adversarial relationships between the industry and government property owners, and in the long run, will create more barriers and cause more problems in connection with wireless facilities siting.

8. Finally, the IAC has learned that in an ex parte communication filed in this Docket on March 9, 2018, the NCTA - The Internet & Television Association requests that the Commission make significant changes to the definition of "small cells" at its regular meeting in March. Neither the IAC nor the State, Tribal and local jurisdictions that we represent have had sufficient opportunity to analyze this request and share substantive feedback with the Commission. It is our understanding that the agenda item for this month focuses primarily wireless siting from the perspective of NEPA and NHPA requirements. We strongly urge the Commission *not* to take any formal action in March regarding a definition of small cells that will apply in all cases, and to defer the NCTA request until the Commission acts in this Docket.

Respectfully submitted on this 21 day of March, 2018.

Elin Swanson Katz, Chair